(5)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

W.P.NO. 2072/2001

PETITIONERS : 1. K.P.Chandrawanshi, S/o Late K.RChandrawanshi, aged about 36 years.
2. A.K.Anand, So Shri A.K.Yakub Aged about 37 years
3. B.L.Rathore, S/o Late C.R.Rathore Aged about 39 years,
4. K.Mahato, S/o Shri U.N.Mahato aged about 39 years,
5. S.K.Parganiha S/o LateT.N.Parganiha Aged about 38 years
6. S.Ghatge, S/o Late G.B.Ghatge Aged about 39 years
7. V.P.Srivas, S/o Shri M.R.Srivas Aged about 38 years
8. R.K.Sonikar S/o Shri P.S.Sonikar Aged About 37 years
9. S.K.Srivastava S/o Shri M.N. Srivastava, aged about 38 years
10. Santosh Singh, S/o Barathu Aged about 46 years

All are residents of NTPC Township, PO: Jamnipali, Korba (C.G.)

P. R. No. 2167/01
Presented by Shri P P Sahu
dated 11/4/01

V E R S U S

RESPONDENTS : 1. National Thermal Power Corporation Limited., through Chairman & Managing Director, Scope Complex, NTPC Bhawan, 7, Lodhi Road, NEW DELHI

2. General Manager, National Thermal Power Corportion Limited, Korba/Balco PO: Jamnipali, Dist.Korba.

5 3. Incharge, Balco Captive Power Plant (NTPC), PO: Jamnipali, Distt.Korba (C.G.)

WRIT PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF APPROPRIATE WRIT/WRITS, DIRECTION/DIRECTIONS, ORDER/ORDERS:

The petitioners above-named most respectfully submit as under: -

1. **Details of the Petitioners:**

A.F.R.

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HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.2072 of 2001

K.P. Chandrawanshi and nine others

- Versus -

National Thermal Power Corporation Limited and two others

Writ Petition No.2087 of 2001

BALCO Captive Power Plant Mazdoor Sangh and another

- Versus -

National Thermal Power Corporation Limited and three others

AND

Writ Petition No.557 of 2004

Satyanand Kacchap and 26 others

- Versus -

National Thermal Power Corporation Limited and another

ORDER FOR CONSIDERATION

Sd/-
L.C. Bhadoo
Judge

HON'BLE SHRI JUSTICE FAKHRUDDIN

I agree

Sd/-
Fakhruddin
Judge

POST FOR ORDER ON 25th MARCH, 2004

Sd/-
L.C. Bhadoo
Judge

A.F.R.

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HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

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- Versus -

National Thermal Power Corporation Limited and three others

AND

Writ Petition No.557 of 2004

Satyanand Kacchap and 26 others

- Versus -

National Thermal Power Corporation Limited and another

Present: -

Dr. N.K. Shukla, Senior Advocate with Mr. Shailendra Shukla, Advocate:	For the petitioners in W.P.No.2072/2001
Mr. Dhirendra Mishra, Advocate:	For the petitioners in W.P.No.2087/2001
Mr. Manindra Shrivastava and Mr. Sanjay K. Agrawal, Advocates:	For the petitioners in W.P.No.557/2004
Mr. Vivek Tankha, Senior Advocate with Mr. Prashant Jayaswal, Mr. P.C. Sen & Mr. H.K. Upadhyay, Advocates:	For the respondent/BALCO.
Mr. L.N. Rao, Additional Solicitor General of India with Mr. P.S. Nair, Senior Advocate; Mr. V.K. Rao, Mr. P.S. Koshy and Mr. Raj Kumar Gupta, Advocates:	For the respondent/NTPC

DIVISION BENCH: -

Hon'ble Mr. Fakhruddin and

Hon'ble Mr. L.C. Bhadoo, JJ.

ORDER

(Passed on 25th March, 2004)

The following order of the Court was passed by *Justice L.C. Bhadoo*: -

1. These three writ petitions relate to the same issue. Therefore, they are being disposed of by this common order.

2. Writ Petition No.2072 of 2001 has been filed by ten individual non-executive officials working at BALCO Captive Power Plant. Similarly, Writ Petition No.557 of 2004 has been filed by 27 non-executive officials working at BALCO Captive Power Plant, whereas Writ Petition No.2087 of 2001 has been filed by BALCO Captive Power Plant Mazdoor Sangh and BALCO Tap Vidyut Karmachari Sangh on behalf of the non-executive officials working at BALCO Captive Power Plant.

3. By these writ petitions the petitioners have raised grievance against the action of respondent No.1 i.e. National Thermal Power Corporation Limited (for short 'NTPC'), whereby the services of non-executive officials numbering in round about 236, is being permanently placed at the disposal of Bharat Aluminum Company Limited (for short 'BALCO'). BALCO was a public undertaking Company under the Government of India. But in the year 2001, the Government of India decided to disinvest the said project and further decided to transfer 51% shares to M/s. Sterlite as a result of which the entire management of BALCO as well as BALCO Captive Power Plant (for short 'BCPP') had vested with M/s. Sterlite under agreement dated 20th June, 2002, with effect from 1st July, 2002.

4. The relief sought in these petitions are; it be declared that the petitioners as well as all persons who are working presently in BCPP, are employees of NTPC; further to restrain the respondents to transfer the services of petitioners as well as other persons who are working in BCPP to the management of BALCO; and the respondent NTPC be further directed to accommodate each and every employee in newly constructed projects at Seepat, Simhadri or any other projects existing or proposed. It is further sought to declare that clause 8.2 and other terms of agreement dated 22.05.1990 entered into between the NTPC and BALCO, are not binding on the petitioners; to quash the decision or action of the respondents to transfer the services of the petitioners to the new management of BALCO; and to issue a writ of mandamus restraining the respondents from doing

any act in furtherance of their decision to transfer the services of the petitioners to the new management of BALCO. In Writ Petition No.2087 of 2001, apart from the above reliefs, it has been prayed that clause 16 (3) read with clause 8 of the agreement dated 22.05.1990 be declared illegal, arbitrary and un-enforceable against the non-executive workers of the respondent as it unilaterally changes the service conditions of all those employees who were not a party to the said agreement; and the respondents be restrained from enforcing the above clause and thereby transferring the non-executive workers working under BCPP to the management of BALCO from NTPC.

5. The case of the petitioners is that the petitioners were enrolled in the Employment Exchange, Korba, and when the NTPC, Korba Super Thermal Power Project, asked to supply the names of the unemployed Artisan (Trainee), their names were sent to NTPC, Korba Super Thermal Power Project. On 26.07.1987, NTPC conducted a written/trade test for the post of Artisan Trainee (Fitter)/(Electrician) and the petitioners appeared in the test on the appointed date, time and venue. The petitioners received appointment orders duly signed by the Deputy General Manager (P & A), Korba Super Thermal Power Project of NTPC. In these appointment orders it is categorically stated that the terms and conditions of appointment of all the petitioners are same. The petitioners were required to undergo training for a period of one year and they were also required to submit indemnity bond on the stamp of Rs.55/- to remain in the services of NTPC or any other department or undertaking of Government of India, for at least three years. On completion of their training, the petitioners received the certificate of completion of training. The petitioners' appointment order contains in its heading, "National Thermal Power Corporation Limited, Government of India Enterprise, BALCO Captive Power Plant". In condition No.16, it was mentioned that their appointment will be against the post sanctioned for BALCO Captive Power Plant/Station which is presently under the management of National Thermal Power Corporation Limited and in case at a later date it is decided by BALCO to directly manage the Plant/ Station or transfer its management to some other existing or new organization (called successor organization) then their post and services will stand transferred to BALCO or such successor organization as the case may be.

6. The petitioners are working with NTPC, which was managing the BALCO Captive Power Plant. However, the Government of India decided for disinvestments of BALCO, which resulted into conversion of BALCO public sector enterprise to private sector enterprise and the existing management decided to manage the BALCO Captive Power Plant by themselves. In view of this changed scenario, the petitioners who were appointed by the NTPC should be posted to other Projects of NTPC. Apart from Diploma Trainees, the respondents have also appointed Junior Foreman for BALCO Captive Power Plant, a few such appointees are Vijay Bahadur Singh, S.C. Singh and V.P. Verma. In other appointment orders similar conditions were mentioned. Vijay Bahadur Singh has been transferred to SPCL-Bhilai Steel Plant, and S.C. Singh & V.P. Verma are working at Vindhyachal Super Thermal Power Project. Chhotelal Sahu was appointed by NTPC for Korba Super Thermal Power Project and posted in BALCO Captive Power Plant in the identical terms as that of the petitioners. However, he has been transferred to Simhadri Project. The persons who were appointed along with the petitioners and having identical terms and conditions were treated by the respondents as their own employees and posted in other Projects run by the NTPC.

7. BALCO entered into an agreement of construction of Captive Thermal Power Station for their aluminum complex at Korba with NTPC on 30th July, 1984. Again BALCO entered into an agreement on 22.05.1990 with NTPC, which is known as BCPP O & M Agreement. Copy of the same is Annexure P-9. In view of clause 8.2 of the said agreement, recruitment of non-executive staff (supervisory and workmen) was undertaken by NTPC specifically for BCPP as per NTPC's recruitment norms and policies. It was further made clear that the staff shall be governed by the NTPC's policies, rules and regulations and in the event of transfer of management from NTPC to any other agency, their services shall be transferable to the successor organization as per provisions of clause 16. Clause 16.3 of the said agreement envisages that in the event of transfer of management, BALCO shall ensure transfer to the successor organization of all non-executive staff recruited for BCPP as per provision contained in clause 8 and such NTPC executives posted at BCPP who are declared by NTPC as surplus to its requirements as a result of the transfer of management. Terms and conditions of such transfer shall not be inferior to those enjoyed by the employees on the date of transfer. In case where such transfer is

not found possible, BALCO shall be responsible for all consequent liabilities including retrenchment compensation, if any. This agreement was entered into in the year 1990, but the date of enforcement was made retrospectively as on 29.06.1987. This agreement entered into between the two parties cannot be made retrospectively in case it affects the rights and liabilities of the third person and the same was entered into between the two parties without any knowledge, much less consent or willingness of the employees. Therefore, the clauses relating to terms and conditions of employees are not binding nor can be enforced against the employees, unless they agree to such conditions. Further according to the O & M Agreement, the management is due to transfer in the year 2012. However, BALCO and NTPC entered into an agreement on 20th June, 2002, proposing the transfer of management of BCPP by 1st July, 2002. Copy of the agreement is Annexure P-10. The petitioners are employees of NTPC forever, otherwise, it is submitted, during the course of employment process, the respondent NTPC has not disclosed to the petitioners that they are employing the petitioners for and on behalf of BALCO as agent of the BALCO. Therefore, the O & M Agreement, i.e. the agreement to manage the BCPP on behalf of the BALCO, is not applicable to the petitioners.

8. In substance, the case of the petitioners is that all the non-executive employees were recruited by the NTPC, training was imparted by the NTPC, and in the appointment orders it was made clear that their service terms and conditions will be as applicable to the NTPC employees and further, in future their services may be transferred to any Project of the NTPC. Therefore, they are the employees of the NTPC and after disinvestment of the BALCO, their services cannot be transferred to the private sector organization BALCO, on the strength of the O & M Agreement dated 22.05.1990 and the subsequent agreement dated 20th June, 2002, entered into between the NTPC and the BALCO.

9. Return has been filed on behalf of the NTPC and BALCO. Their categorical stand is that the writ petition under Article 226 of the Constitution of India is not maintainable as the petitioners have not been able to show their legal right. In any case, contractual rights between the parties, if any, are also not enforceable under Article 226 or 227 of the Constitution of India. Highly disputed questions are involved which cannot be decided in a writ petition under Article 226. Provisions of the Madhya Pradesh Industrial Relations Act are applicable to BALCO & NTPC and the petitioners have efficacious

alternative remedy of approaching the Labour Court, if they so desire. NTPC's case is that NTPC is merely an agent of BALCO on a specific Power of Attorney given to them. The ownership of BCPP belongs to BALCO. Recruitment was made pursuant to an agreement exclusively for BCPP with specific undertaking from the non-executive employees. Non-executive employees joined employment knowing fully well the purported meaning of undertaking. The petitioners have no right to question the agreement between the BALCO and the respondents. The construction of BCPP was entrusted by BALCO to NTPC. The first unit of BCPP was commissioned on 28.06.1987 and the remaining three units were commissioned 2 ½ to 4 months duration from each other. As per the understanding between BALCO and NTPC which was given a formal shape through O & M (Operation and Maintenance) Agreement dated 22.05.1990 effective from 28.06.1987, the Operation and Maintenance of BCPP was also entrusted to NTPC. In order to carry out the Operation and Maintenance of BCPP, NTPC recruited required number of workmen and supervisors starting from the mid 1980's. The recruitment of these employees was for the limited purpose of carrying out the O & M of BCPP as long as management of BCPP remained with NTPC. The offer of appointment as well as the undertaking given by the employees specifically brings out the above fact. Besides, the O & M Agreement signed between NTPC and BALCO also makes it very clear that the recruitment made by NTPC is specifically for BCPP and in the event of transfer of O & M/ Management of BCPP to any other agency, the services of such employees will be transferable to the successor agency. The ownership of BCPP was never alienated and continued to stay with BALCO. BCPP was and is being managed by NTPC on behalf of its owner i.e. BALCO. It is being operated under the specific Power of Attorney. So the manpower of this plant is shown separately from the manpower of NTPC in its annual report. Similarly, the Balance Sheet and Profit & Loss Account statements of NTPC also do not include BCPP. So it is not another unit or division of NTPC.

10. The petitioners have totally misunderstood the action taken by the respondents. The BCPP is owned by BALCO. The BALCO, because of their lack of expertise, wanted the respondents to maintain the plant on behalf of BALCO. For this purpose necessary authorization was given and an agreement was entered into. In accordance with the agreement various administrative actions were taken and all those actions were taken for and

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on behalf of BALCO and not for NTPC. While recruiting people for BCPP and NTPC a common platform was made available. Due to oversight, certain lapses have crept into a few of the appointment letters. Such letters have not been issued to other employees. This is confined to the particular employees and the petitioners cannot take the advantage of lapses in a few cases to apply the condition of that letter to others. The respondents have filed the appointment letters issued to BCPP employees which specifically contain provisions for their transfer to BALCO if and when management of BCPP is taken back by BALCO or any successor organization, which are Annexure R-1. These employees have also executed an undertaking, which is Annexure R-2. In Annexure R-1, it is specifically written on the right hand corner of page-1 that the appointment is for BCPP. The petitioners deliberately not filed the appointment letters issued to hundreds of other non-executive employees of BCPP along with the undertaking executed by them at the time of joining that they understand their appointment is for BCPP, which is owned by BALCO. However, certain benefits given to the employees appointed to BCPP were to ensure that their service conditions would not be in any way inferior to the service conditions of the person employed in NTPC. So long as BCPP is managed by NTPC, it was thought just and proper and in the interest of equity and justice that these employees of BCPP managed by NTPC should also get similar service conditions. To avoid allegation of arbitrariness similar benefits were given. The Memorandum of Understanding executed by the authorities gives no right or authority to the non-executive employees to claim themselves employees of NTPC. When there were similar service conditions, similar benefits were being given and therefore, MOU was entered into to avoid discrimination. Since, NTPC was looking after BCPP and they were supervised by NTPC this certificate was issued. When employees are even employed through an agent, similar standing orders are required to be issued. Annexure P-19 filed by the petitioners is misleading. J.R. Bharadwaj was, in fact, appointed for BCPP on his application against the circular notifying vacancies of BCPP. It is not correct to say that he has been transferred from the Korba Super Thermal Power Station to BCPP. The appointment letter is Annexure R-3. It is denied that there was any relationship of employer and employee between NTPC and BCPP. Some of the non-executive employees of NTPC had been accommodated in BCPP on their personal request since vacancy for accommodating them existed at that time in BCPP. It is also denied that

Baijnath Singh has been appointed in lieu of acquisition of his land by NTPC. He has been appointed by virtue of his fulfilling the requisite job specification and was found suitable for the post notified for BCPP.

11. As per clauses 8 & 16 (3) of the agreement dated 22.05.1990 entered into between the NTPC and BALCO, since the petitioners were recruited and appointed for BCPP they can be transferred to BCPP which was made clear to the non-executive employees by mentioning in para 14 of majority of appointment letters that they are being appointed against the post sanctioned for BALCO Captive Power Plant/Station which is presently under the management of NTPC. In case at a later date if it is decided by BALCO to directly manage the Plant/Station or transfer its management to some other existing or new organization, then their post and services will stand transferred to BALCO or such successor organization as the case may be. They will not have any option to remain on the rolls of NTPC. Once, BCPP owned by BALCO is taken over by the BALCO, the entire non-executive staff of BCPP will continue to remain in BCPP under the management of BALCO in terms of clauses 8 & 16.3 of the agreement. Once the plant is taken over, if the non-executive employees are not going to BALCO and if they are to be taken by NTPC, they will become surplus and NTPC will have no option except retrenchment. To avoid such contingency also, it is just and proper that the non-executive employees should go along with the plant.

12. Similar return has been filed on behalf of BALCO.

13. Additional return has also been filed on behalf of the NTPC. As far as NTPC is concerned each power station is an independent unit in the matters of non-executive. Recruitment of non-executives is made on the basis of requirement of the concerned project by the Head of the project and not by the NTPC Headquarters. Annexure R-4 is the recruitment policy. The seniority of non-executive employees is based on the posting in the establishment itself and it has no connection with non-executive employees of any other establishment. Cadre of non-executive in each trade is within the power station only and there is no All India/All Region based cadre. Non-executives are not transferred from one unit to another unit except on specific request by concerned employee. In case of vacancies in any unit which are required in other establishment also non-executive employees are free to apply against such vacancies. Transfers

take place only if the requisitioning unit finds the applicants suitable for the vacant position. The employee cannot seek transfer to another establishment or factory as a matter of right. Every employee who got employment in BCPP is fully aware that they are employed in the said establishment and they are not entitled to transfer to any other factory establishment of NTPC as of right. No employee in any NTPC establishment has any legal right to be transferred to another unit. There is no transfer policy of non-executives. Therefore, the contention of the petitioners that services of non-executive employees are transferable is factually incorrect. The allegation of retrenchment is baseless. There is no retrenchment whatsoever. The employees are working with the same conditions of service at the same place at the same post under the same ownership that is BALCO. Neither the Union nor the workers can compel NTPC to continue the management. The answering respondent reiterates that there is no such transfer. The employees working in one unit are entitled to apply for employment in another unit and if the other unit agrees it may take on their strength. It is not a right but a permission given looking into the fact of each case and employment in other power station given on their specific request. The employee who gives an undertaking is bound by that undertaking. Every unit is headed by an officer who is empowered with authority to recruit people for the Project. As a measure of goodwill, opportunity is given to employees working in another projects to apply for employment in the project and if the applicants are found suitable new employment is given in that project. Employees of BCPP like employees in other NTPC Projects have also been given opportunity to make application for appointment and the new projects after examining all details, may give appointment, if found suitable. The allegations of the petitioners that the employees are sent from Public Sectors to Private Organization is totally baseless. In fact there is no transfer. Persons are appointed in the factory owned by BALCO. They remain in the same post with same place of posting. However, it was made clear to the petitioners that each individual concerned is appointed for BCPP. The petitioners are also aware of the fact that BCPP is owned by BALCO and NTPC is merely an agent to run the establishment for some time and not permanently.

14. We have heard Dr. N.K. Shukla, Senior Advocate, Mr. Dhirendra Mishra & Mr. Manindra Shrivastava, Advocates on behalf of the petitioners; Mr. L.N. Rao, Additional Solicitor General of India on behalf of the respondent/

NTPC; and Mr. Vivek Tankha, Senior Advocate on behalf of the respondent/BALCO.

15. The first point raised by the learned counsel for the respondents is that as the petitioners have not been able to show infringement of any of their fundamental right or violation of any legal right, therefore, petition for issuance of writ of mandamus cannot be entertained. The second point argued by the learned counsel for the respondents is that these writ petitions are not maintainable for the reason that the petitioners have alternative efficacious remedy available to redress their grievance. Their case is covered under the Madhya Pradesh Industrial Relations Act, 1960. As per the provisions of Section 51 of the said Act, they ought to have approached the Labour Court instead of approaching this Court by invoking the extra-ordinary jurisdiction under Article 226 of the Constitution of India. However, as far as the second point is concerned, since the petitions are being heard finally on their merits, therefore, the learned counsel for the respondents had not laid much stress on this point.

16. On the other hand, learned counsel for the petitioners argued that the question involved in these petitions is pure and simple interpretation of certain agreements and appointment letters and no disputed facts are involved, therefore, this Court is entitled to invoke the jurisdiction under Article 226 of the Constitution of India and the petitions of the petitioners should not be thrown out on these technical objections as the question involved relates to the life of the petitioners, their family members and their right to continue in the job as per the terms and conditions of the appointment, as the action of respondent transferring the petitioners' services to BALCO is arbitrary and unreasonable. Therefore, the writ petitions are maintainable.

17. In this connection, the settled law is that the question of alternative remedy is rule of discretion and not the rule of law. The Hon'ble Apex Court in the matter of **ABL International Limited and another vs. Export Credit Guarantee Corporation of India Limited and others** reported in **JT 2003 (10) SC 300** held that,

> "While entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of

the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others** reported in **JT 1998 (7) SC 243; 1998 (8) SCC 1**]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction."

In para 27 of the above judgment, the Court has held that "following legal principles emerge as to the maintainability of a writ petition: -

a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

c) A writ petition involving a consequential relief of monetary claim is also maintainable."

18. Therefore, in view of the above judgment of the Hon'ble Apex Court, the writ petition is also maintainable where some disputed questions of facts arise for consideration and also in appropriate cases where the writ petition is against a State or an instrumentality of a State arising out of a contractual obligation is maintainable. The petitioners' case is that they were appointed by the NTPC and their appointment letters contain the terms and conditions of the service. Now in violation of those terms and conditions the services of the petitioners are being transferred to BALCO. Therefore, in the above circumstances, we are of the opinion that the writ petitions are maintainable. In the present writ petitions the only question involved is of the interpretation of various appointment letters, the agreements entered into between the NTPC & BALCO and that the NTPC is acting against the contractual obligations arising out of the terms and conditions of their appointment.

19. In the matter of **Radha Raman Samanta vs. Bank of India and others** reported in **(2004) 1 Supreme Court Cases 605**, the Hon'ble Apex Court held that

> "The powers under Article 226 could be exercised for the enforcement of fundamental rights and also for any other purpose. It was, therefore, open to the Single Judge to issue an appropriate direction to the respondent Bank, if otherwise justifiable on facts. It was also not improper for the Single Judge to look into undisputed documents and to infer as to the status of employment of the appellant. Examination of undisputed facts is not debarred in a proceeding under Article 226."

The Hon'ble Apex Court further goes to hold that

> "Powers under Article 226 of the Constitution could be exercised for the enforcement of fundamental rights available under Part III of the Constitution and also for any other purpose. High Courts have often exercised their power under Article 226 of the Constitution for enforcement of a legal right. It is, therefore, open to the learned Single Judge to issue an appropriate direction to the respondent Bank, if otherwise justifiable on facts. To make matters clear, we may cite *Style (Dress Land) v. Union Territory, Chandigarh [(1999) 7 SCC 89]* in which this Court held that:"
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> > "Action of renewability should be gauged not on the nature of function but public nature of the body exercising that function and such action shall be open to judicial review even if it pertains to the contractual field."
> >
> > (Emphasis supplied)

20. In the matter of **Harbanslal Sahnia and another vs. Indian Oil Corpn. Ltd. and others** reported in **(2003) 2 Supreme Court Cases 107**, the Hon'ble Apex Court held that

> "The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of available of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

21. In the instant case, the petitioners have challenged the contractual obligations and also that some of the employees of BCPP have been transferred to other projects of the NTPC, whereas, the petitioners are not being adjusted, therefore, this action of NTPC is arbitrary, unreasonable, and violative of Article 14 of the Constitution of India. Therefore, the writ petitions are maintainable, if it is otherwise justifiable on facts and writ can be issued for any other purpose also. In view of the above laws laid down

by the Hon'ble Apex Court, we are of the opinion that the objections raised by the learned counsel for the respondents about the maintainability of these writ petitions is not sustainable.

22. Now coming to the merits of the case, learned counsel for the petitioners drew our attention towards the appointment letters and their terms and conditions and tried to demonstrate that the petitioners i.e. non-executive officials were appointed under the NTPC services and they were never told that they are being appointed as BALCO employees. They submitted that this argument further stands strengthened on the ground that some of the employees of BCPP were transferred to other projects of the NTPC and some of the employees of the other projects of NTPC were transferred to BCPP. They further submitted that the terms and conditions laid down in their appointment letters makes it clear that all the facilities, salary and other service conditions which were made available in the case of the petitioners were same to that of other NTPC employees. Moreover, at the time of their appointment, the petitioners were required to submit an undertaking that they will serve NTPC at least three years and for that purpose an undertaking was obtained from their guardian and father. Their names were invited from the employment exchange for their appointment in the NTPC project. The bipartite agreement entered into between the NTPC and BALCO to which the petitioners were not party was not binding on the petitioners as the agreement was entered into without the knowledge of the petitioners on their back. It was further argued that there are non-executive employees who were even appointed earlier to 1985 and have been transferred from other projects of the NTPC to BCPP and they were never appointed for the BCPP, therefore, they cannot be transferred to BALCO. It was further argued that certain non-executive employees were appointed under a scheme of the NTPC under which if the agricultural land of any family was acquired for the purpose of setting up of NTPC project, then one member of that family was to be given employment and in this case also few employees were given appointment under that scheme, therefore, they are entitled to continue as NTPC employees and not as BALCO employees.

23. On the other hand, Mr. L.N. Rao, the learned Additional Solicitor General of India vehemently argued that in the year 1984, BALCO decided to set up BCPP in order to augment the regular electric supply to BALCO. Therefore, an agreement was entered into between the NTPC and BALCO for construction of BCPP building and thereafter, when the construction

activities were going on it was decided by the BALCO to handover the plant to NTPC for its operation, maintenance, management etc. Therefore, another agreement was entered into between the NTPC and BALCO on 22.05.1990 in which a provision was made regarding various categories of employees who are to be recruited by the NTPC on behalf of BALCO and that agreement was made effective from 1987. Therefore, the non-executives were appointed by the NTPC for BALCO Captive Power Plant and at the time of appointment it was made clear to all those non-executives that the appointment is for BCPP. Further, in their appointment letters also it was specifically written on the top, on right hand side that the appointment is for BCPP. Even an undertaking was given by the employees that in case the plant is transferred to BALCO their services could be transferred to BALCO. The learned Additional Solicitor General further argued that as per the policy of NTPC, non-executives are always appointed project-wise and their services are not transferable. However, in some exceptional cases as and when any vacancy arises in any of the projects of the NTPC, then specific applications are invited to fill up those vacancies and if in that process, any employee of other project is appointed on the ground of suitability that does not mean that it is a transfer. Therefore, it cannot be understood that the non-executives are entitled for their transfer from one project to another project on a regular basis. He further argued that clause 8.2 of the O & M Agreement, which deals with the non-executives, envisages that requirement of non-executive staff shall be undertaken by NTPC specifically for BCPP as per NTPC's requirement, norms and policies. This staff shall be governed by the NTPC's policies, rules and regulations. In the event of transfer of management from NTPC to any other agency, their services shall be transferable to the successor organization as per provisions of clause 16. Clause 16.3 deals with transfer of staff, which lays down that in the event of transfer of management, BALCO shall ensure transfer to the successor organization of all non-executive staff recruited for BCPP as per provision contained in clause 8.0, and such NTPC executives posted at BCPP who are declared by NTPC as surplus to its requirements as a result of the transfer of management. Terms and conditions of such transfer shall not be inferior to those enjoyed by the employees on the date of transfer. In cases where such transfer is not found possible, BALCO shall be responsible for all consequent liabilities including retrenchment compensation, if any. At the end of plant life, BALCO shall be responsible for all liabilities including retrenchment

compensation etc., when the non-executives and such NTPC executives posted at BCPP who are declared surplus are retrenched or any other dispensation as deemed fit is resorted to. Therefore, the petitioners' petitions are liable to be dismissed.

24. In the light of the above arguments, we have perused the petitions and relevant documents. In the year 1984, BALCO decided to set up a power plant in order to augment the regular electric supply to the BALCO factory and therefore, the NTPC and BALCO entered into an agreement under which the construction of the plant was handed over to the NTPC. When the buildings came up, another agreement dated 22.05.1990 was entered into between the two companies again and it was decided that BCPP will be managed, operated, supervised, maintained and controlled by the NTPC and for that purpose the staff requirement was also considered and that agreement was made effective from 1987. Under this agreement, the NTPC was given authority to recruit the staff on behalf of BALCO for operation, maintenance, running, management and control of the plant and in that process non-executives were also recruited. An advertisement was issued by NTPC for a combined test for appointment of the employees for other projects of the NTPC and also for BCPP. Names were also called from the employment exchange. Those persons who qualified in the test were given offer of appointment and they were asked to complete certain formalities and were required to undergo one year training. After completion of the training appointment orders were issued and on those appointment orders it was made known to the appointees that their appointment is being made for the project of BCPP. In para 14 of that appointment order it was specifically mentioned, "Your appointment will be against the post sanctioned for BALCO Captive Power Plant/Station which is presently under the management of National Thermal Power Corporation Limited. In case at a later date it is decided by BALCO to directly manage the Plant/Station or transfer its management to some other existing or new organization then your post and your services will stand transferred to BALCO or such successor organization as the case may be." Further, these employees gave undertaking separately saying therein, "I fully understand and agree that my appointment has been made for employment in BALCO Captive Power Plant/Station which is presently under the management of National Thermal Power Corporation Limited." It was further undertaken by the appointees that they gave consent by saying,

"my post and services will stand transferred to BALCO or such successor organization, as the case may be. I shall have no option to remain on the rolls of National Thermal Power Corporation Ltd., and shall not claim any compensation or benefit of my past services".

25. Therefore, in view of the above appointment order and the subsequent undertaking given by the employees, it is clear that their appointment was for BCPP and not for NTPC or for any other plant of NTPC. These appointments were made in terms of the agreement dated 22.05.1990 entered into between the NTPC and BALCO. If we look into clauses 8.2 & 16.3 of the agreement dated 22.05.1990 and the appointment orders and the subsequent undertaking given by the appointees, they are on the same terms and conditions. Therefore, these persons are now estopped from challenging those appointment orders and undertakings.

26. Specific case of the NTPC is that as and when any project is set up, the non-executive employees are always appointed for that project only and their services always remain attached with that project and their services are not transferable to any other project. In view of this scheme, BCPP was set up as per the agreement with BALCO and the non-executives were appointed for BALCO project. It is true that the petitioners were not party to that agreement. It was not necessary that they should become party to that agreement, because the agreement was entered into between the BALCO and NTPC and in that agreement the terms and conditions were incorporated for appointment of the employees and NTPC was given authority on behalf of the BALCO to appoint employees for their project. Hence, NTPC got the authority to recruit the employees on behalf of BALCO on the strength of the agreement and when this agreement was entered between NTPC and BALCO, the petitioners were not even in service, therefore, how they could have been party to this agreement, rather they were appointed on the strength of the agreement dated 22.05.1990. Therefore, even NTPC authorities were not authorized and entitled to appoint any employee in violation of that agreement. If any authority acts beyond its power given under a particular instrument of agreement or authority, that appointment is without authority and any appointee who has been appointed under appointment letter which has been issued without authority, cannot derive any right or benefit of a regular appointment of any organization of which that authority is. Any appointment made without authority, without any post sanctioned or vacant is always illegal.

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Therefore, all the powers derived by the NTPC authorities for appointment of the non-executives were from the agreement and in terms of that agreement appointments orders were issued and undertakings were also given by the employees. As per the agreement, the employees who were appointed for BCPP were appointed on the same terms and conditions and facilities which were available to the other similarly situated NTPC employees in order to ensure that the employees of the BCPP also get similar facilities, emoluments and rights and they should not be discriminated in the matter of their service conditions. If the petitioners were appointed as per the agreement on the same service conditions as were admissible to the NTPC employees that does not give them right to be treated as NTPC employees. Therefore, we do not find any substance in the argument of the learned counsel for the petitioners that the petitioners non-executives were appointed as NTPC employees.

27. Now, coming to the question that in certain cases format of appointment order which was meant for BCPP was inadvertently not issued and appointment orders were issued in some other format, as has been mentioned above, a combined competitive examination was conducted for BCPP as well as for NTPC and therefore, in some cases, discrepancies may have occurred and the particular format meant for BCPP was not used. As has been mentioned in the return filed by the NTPC, on account of inadvertency or by mistake, the particular format meant for BCPP was not used in respect of any particular employee, however that employee was appointed for the BCPP and continued to work in BCPP, therefore, on account of that inadvertent mistake he cannot be treated to be regular employee of the NTPC. If it is allowed, then the same is contrary to the agreement dated 22.05.1990. Moreover, since beginning these employees are appointed in BCPP and they are working in BCPP along with other non-executives, therefore, now they cannot claim that they are NTPC employees. Even otherwise, as per the judgment of the Hon'ble Apex Court in the matter of **BALCO Employees' Union (Regd.) vs. Union of India and others** reported in **(2002) 2 Supreme Court Cases 333**, in para 59, while dealing with the case of disinvestment of BALCO, the Hon'ble Apex Court held that

> "we approve the following observations of the Karnataka High Court in *Prof. Babu Mathew v. Union of India [(1997) 90 Comp Cas 455 (Kant)]* where the Court while dealing with

disinvestment up to 49% of the Government's holding in a public sector company observed at p. 478G-H as follows:"

> "Any economic reform, including disinvestment in PSEs is intended to shake the system for public good. The intention of disinvestment is to make PSEs more efficient and competitive and perform better. The concept of the public sector and what should be the role of the public sector in the development of the country, are matters of policy closely linked to economic reforms. While it is true that any policy of the Government should be in public interest, it is not shown how prior consultation with employees of a PSE before disinvestment is a facet of such public interest."

It was further mentioned that

> "As a result of disinvestment of 51% of the shares of the Company, the management and control, no doubt, has gone into private hands. Nevertheless, it cannot, in law, be said that the employer for the workmen has changed. The employees continue to be under the Company and change of management does not in law amount to a change in employment."

28. Therefore, in view of the above observations of the Hon'ble Apex Court in the case of **BALCO Employees' Union (Regd.)** *(supra)*, the arguments of the learned counsel for the petitioners that the services of the petitioners cannot be transferred to the BALCO is without force. In fact this is not transfer of employees as they are employees of that Plant which is being handed over to its owner.

29. During the course of the arguments, learned counsel for the respondent/ NTPC very fairly admitted that out of 236 non-executive employees, the undertaking of 199 non-executive employees are with them to the effect that if their post and service will stand transferred to BALCO or any such successor organization as the case may be and they shall have no option to remain on the rolls of the NTPC and shall not claim any compensation or benefit of their past service, however, the undertaking of the remaining 37 employees could not be taken, as their appointment letter did not contain para 14 regarding their appointment for BCPP. Learned counsel for the NTPC, very fairly submitted that they can make representation to the NTPC for their transfer to the NTPC projects and their representation will be considered and decided by the NTPC, in case any vacancy will be available in the NTPC projects. Therefore, the remaining 37 non-executive employees who had not gave their undertaking that they will have no option

but to opt for BALCO, if they so desire, can make representation to the NTPC for their transfer in the NTPC projects and in turn the NTPC shall consider their representation on merit and of course subject to the availability of vacancy in the NTPC projects.

30. Learned counsel for the petitioners argued that during the course of these years certain employees were transferred from BCPP to other projects of NTPC and certain employees of other projects were transferred to BCPP, therefore, the petitioners and the remaining non-executives should also be transferred to the NTPC projects. They further argued that in this case, the NTPC authorities have adopted a pick and choose method.

31. On the other hand, learned Senior Counsel for the respondents argued that the argument is without basis. Few employees were, of course, selected in other projects, but as and when any vacancy arose, applications were invited from the employees of other projects of the NTPC and in that process, if any employee was found suitable and he was selected, then he was appointed in other projects and in that case, no selection was made in arbitrary manner and no pick and choose method was adopted. Learned counsel for the respondents further argued that first of all, the petitioners are not entitled to develop this case during the course of the argument as no specific allegations of mala fide, arbitrariness, or bias has been raised in their petitions. Therefore, they are not entitled to raise this point. Even otherwise, it has been specifically mentioned in the return of the respondents that if any employee was appointed in any other project that appointment was on the basis of selection and suitability and after following proper procedure like inviting the applications etc., and that cannot be termed as transfer and that does not entitle the petitioners to claim the same treatment without following appropriate procedure.

32. In this regard, Hon'ble the Apex Court in the matter of **Municipal Corporation of the City of Jabalpur vs. State of Madhya Pradesh and another** reported in **AIR 1966 Supreme Court 837** in para 9 of the judgment held that

> "The question as to who is a transferor, is obviously a question of fact or at best a mixed question of law and fact and when a party in a Writ Petition does not allege any such fact, it stands to reason that he ought not to be permitted to travel beyond the facts stated, at the stage of the arguments. To confine a party to his pleadings, particularly to his

> allegations as regards facts is dictated not merely by the need for orderliness in these proceedings but for avoiding surprise to the other party and consequent injustice resulting therefrom."

Further, in the matter of **Bhikaji Narain Dhakras and others vs. State of Madhya Pradesh and another** reported in **AIR 1955 SC 781**, in head note (b), the Hon'ble Apex Court held that "Objection not raised in petition cannot be permitted to be raised in argument."

Similarly, in the matter of **Piare Lal vs. Union of India and others** reported in **AIR 1975 Supreme Court 650** the Hon'ble Apex Court held that

> "appellant could not be allowed to do so at that stage --- In the absence of challenge to the subsequent orders Court could not examine their validity --- Original petition had become infructuous by reason of the subsequent orders and was liable to be dismissed."

33. In view of the above laws laid down by the Hon'ble Apex Court, since the petitioners have not challenged in these petitions that certain non-executives were sent to other projects on pick and choose basis and the ground of unreasonableness, arbitrariness and bias has not been taken in the petition itself, therefore, at this stage, the learned counsel for the petitioners cannot be permitted to raise this point at the stage of final hearing.

34. Now, coming to the point argued by the counsel for the petitioners that Baijnath and some others were appointed by the NTPC and they were given employment since their agricultural land was acquired for setting up of the NTPC project because as per NTPC scheme one member of such family whose land is acquired, is given employment, therefore, these employees are the NTPC employees and they cannot be transferred to BALCO. In this argument also we do not find any substance for the reason that first of all, the respondents have denied this allegation and said that Baijnath and others were appointed on the basis of their selection and not on the ground of their land was acquired for the NTPC project. Even otherwise, if we take the argument as it is, one member of the family whose land was acquired by NTPC was entitled for employment and accordingly, he was given employment in the BCPP project. It was not necessary that such persons were to be employed in NTPC without having any vacancy. Such concessional appointments are always given as and when vacancy is available. When the vacancy had arisen on account of setting up of the

BCPP and if any such persons were given employment in the BCPP, they cannot now, raise any grievance that they should be transferred to the NTPC project.

35. Now, coming to the question about the interpretation of clause 16.3 of agreement dated 22.05.1990 which is said to be against the interest of the petitioners and the quashment of the same has been asked for, clause 16.3 reads thus,

> "In the event of transfer of management, BALCO shall ensure transfer to the successor organization of all non-executive staff recruited for BCPP as per provision contained in clause 8.0, and such NTPC executives posted at BCPP who are declared by NTPC as surplus to its requirements as a result of the transfer of management. Terms and conditions of such transfer shall not be inferior to those enjoyed by the employees on the date of transfer. In cases where such transfer is not found possible, BALCO shall be responsible for all consequent liabilities including retrenchment compensation, if any. At the end of plant life, BALCO shall be responsible for all liabilities including retrenchment compensation etc., when the non-executives and such NTPC executives posted at BCPP who are declared surplus are retrenched or any other dispensation as deemed fit is resorted to".

In the first instance, for example, even if this clause is quashed, even then it is not going to serve any purpose of the petitioners for the reason that as has been held above, their appointments were made by the NTPC for BCPP under the authority of BALCO on behalf of BALCO and as has been held above, they are the employees of BALCO. Even otherwise, we fail to understand how the petitioners are at disadvantageous position on account of clause 16.3. At the outset, the learned Additional Solicitor General of India further submitted that the petitioners should not have any grievance for being placed under the BALCO for the reason that there is no move to put them on any disadvantageous position or on account of BCPP being taken over by the BALCO, their service conditions are not going to be changed and they will continue to avail the same perks, facilities and service conditions which were admissible to them under the NTPC. At any given point of time, if their service conditions are changed then they will be at liberty to make representation to the BALCO in terms of clause 16.3 of the agreement dated 22.05.1990 entered into between the BALCO and NTPC. In fact, a very wise step was taken by the NTPC to ensure that in case, the BCPP is transferred to BALCO or some other organization, then the service conditions of the employees of BCPP should not be put to any

disadvantageous position and it has been ensured that they should get the same facilities, perks and service conditions at the time of taking over of BCPP by other organization, which are admissible to the NTPC employees. Even in case of retrenchment, these employees have been made entitled to receive the retrenchment benefits. Therefore, clause 16.3 of the agreement dated 22.05.1990 is not in any way disadvantageous to the position of the petitioners, this clause gives right to them to continue in service or to get retrenchment compensation.

36. Now, coming to the question of those employees who were appointed in other projects of NTPC and during the years transferred to BCPP whether they are entitled to go back to their parent project, in this connection, the learned Additional Solicitor General submitted that in the first instance, these employees came on their own request looking to their personal difficulties and opted for BCPP, therefore, as of right they are not entitled for their transfer to other NTPC projects. In the second place, he was very fair in making his submissions that even otherwise, if such employees will make representation to the NTPC and if any vacancy will be available in any of the NTPC projects, then the NTPC will try to adjust these employees. In view of the above submission of the learned Additional Solicitor General, we think that such employees should not have any grievance for the reason that first of all they were transferred to the project on their own request and secondly as and when any vacancy will arise then their cases will be considered for transfer in the NTPC projects provided they apply for the same.

37. In the result, we do not find any substance in the above petitions. With the above observations, the writ petitions are dismissed.

Sd/-
Fakhruddin
Judge

Sd/-
L.C. Bhadoo
Judge

Soma